Backgrounder

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SUBSIDIES AND UNITED STATES TRADE LAW: THE APPLICATION TO CANADA

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INTRODUCTION

In the 1980s, allegations of unfair trade practices have increased in number and frequency. The United States, in particular, has been at the forefront in using its trade remedy laws and its influence as a significant trading nation to combat practices it considers to be unfair to domestic industry.

Canadian businesses have felt the impact of U.S. trade remedy laws as American corporations have used countervailing duty and anti-dumping actions to protect their domestic markets from imported products. In recent years, a number of U.S. countervail actions in respect of Canadian goods have received a great deal of publicity, fuelling the concern that increasing numbers of government assistance programs will be scrutinized under U.S. law.

This paper will examine the application of U.S. countervailing duty law to Canadian products. The focus will be on domestic subsidies and how the International Trade Administration of the U.S. Department of Commerce has applied the law in relation to Canadian government programs. A description of how subsidies are treated under the General Agreement on Tariffs and Trade (GATT) will be followed by a discussion of U.S. countervailing duty law. Some implications for the ongoing subsidies negotiations under the Canada-U.S. Free Trade Agreement will also be outlined.

GATT RULES IN RELATION TO SUBSIDIES

The GATT has long been concerned with the trade implications of government assistance to domestic industry. Article VI of the General Agreement, recognizing that an importing country may levy countervailing duties to offset such subsidies, seeks to establish certain conditions on this practice. As a result of the Tokyo Round of the GATT negotiations in the 1970s, a number of codes covering non-tariff measures were developed. Among these was the Agreement on Interpretation and Application of Articles VI, XVI and XXIII, more commonly known as the "Subsidies Code." By and large, this calls for subsidies to be used in a way that will not distort international trade and commits signatories not to impede trade through the unwarranted use of countervailing duties.

The Subsidies Code deals with both export subsidies (government payments or financial benefits to domestic producers or exporters contingent on their exporting a particular product) and domestic subsidies. It prohibits the granting of export subsidies on products other than certain primary products. It also contains a list of these subsidies.

With regard to domestic subsidies, however, the Code is less categorical. By neither approving nor disapproving of their use, it recognizes the basic duality of their nature. The Code acknowledges that domestic subsidies can promote important social and economic policy objectives, such as: the elimination of regional disparity; the restructuring of certain sectors of the economy; the maintenance of employment and the re-training of workers; the encouragement of research and development; and the redeployment of industry to avoid congestion and environmental problems. The Code also, however, recognizes that domestic subsidies can cause adverse effects on other countries.(1)

Although neither the GATT nor the Subsidies Code defines subsidy, the Code gives the following examples of possible forms of

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(1) Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Article 11, paragraph 1.

subsidies that may give an advantage to a particular enterprise: government financial assistance to commercial enterprises including grants, loans or guarantees; government provision or government financed provision of utility, supply distribution and other operational or support services or facilities; government financing of research and development programs; fiscal incentives; and government subscription to, or provision of equity capital.(2) The Code also notes that these subsidies are normally granted by region or by sector.

The Code acknowledges that subsidies granted by one signatory may cause or threaten to cause material injury to a domestic industry of another signatory and suggests that, when formulating their subsidies programs, signatories should weigh the possible adverse effects on trade.(3)

The Subsidies Code is composed of two parts, commonly known as Track I and Track II. Track I sets out certain procedural and substantive tests for the imposition of countervailing duties while Track II establishes rules relating to domestic and export subsidies and complaint and dispute settlement procedures. This paper will discuss only Track I.

Track I outlines procedural rules for Code signatories to follow in a countervailing duty investigation. Countervailing duties may be levied only after an investigation is conducted in accordance with these rules. Notice of an investigation must be given to all interested parties, who then have an opportunity to present their case to an investigating authority.

Track I also establishes the substantive requirements that have to be met before a countervailing duty can be imposed. Duties can be levied only after an investigation has shown that: (i) a subsidy exists; (ii) there has been material injury or the threat thereof to a domestic

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(2) Ibid., Article 11, paragraph 3.

(3) Ibid., Article 11, paragraph 2.

industry; and (iii) a causal link exists between the subsidized imports and the injury.

The countervailing duty laws of both Canada and the United States conform with the basic provisions of Track I of the Subsidies Code.

UNITED STATES COUNTERVAILING DUTY LAW

Over the past decade there have been a number of changes to U.S. countervailing duty law. The Trade Agreements Act of 1979 amended U.S. law to bring it into conformity with the GATT Subsidies Code, while further amendments were enacted by the Trade and Tariff Act of 1984 and by the Omnibus Trade and Competitiveness Act of 1988.(4)

Consistent with the GATT Subsidies Code, U.S. law provides that a countervailing duty may be levied on subsidized imports that are causing or threatening to cause material injury to domestic industry producing similar products. Determinations as to whether goods imported into the United States are subsidized are made by the International Trade Administration (ITA) of the Department of Commerce. Material injury determinations are made by an independent quasi-judicial agency, the United States International Trade Commission (ITC).

A. The Countervailing Duty Determination Process

A countervailing duty action can be initiated by manufacturers, wholesalers, trade unions, groups of workers representing an industry, trade or business associations or the U.S. government.(5) If

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(4) The majority of U.S. trade laws have been codified and consolidated under Title 19 of the United States Code. Unless otherwise indicated, the codified version will be used to identify the specific legislative provisions to which reference is made in this paper.

(5) 19 U.S.C.A. section 1671a(b).

the country in which the imported goods originate is a signatory of the GATT Subsidies Code, an investigation will be conducted by the ITA and the ITC.

An action is commenced by filing a petition simultaneously with the ITA and the ITC. The latter undertakes a preliminary investigation to determine if there is a "reasonable indication" that the relevant U.S. industry is materially injured or threatened with material injury by the imported products. At the same time, the ITA conducts its preliminary investigation into whether "there is a reasonable basis to believe or suspect that a subsidy is being provided" to the imported goods.(6)

If the ITA's preliminary ruling is affirmative, it goes on to make a final determination with respect to subsidization and the ITC proceeds with its final determination on material injury. If both final rulings are affirmative, a countervailing duty will be imposed.

B. Time Limitations for Countervailing Duty Proceedings

Upon the filing of a petition alleging subsidization, the ITA has 20 days to determine if the petition contains sufficient information for it to commence an investigation. If the determination is affirmative, an investigation will be commenced and both the ITC and the petitioner will be notified. A negative determination at this stage leads to a dismissal of the petition and the termination of proceedings.

The ITC has 45 days from the filing of a petition to issue its preliminary determination with respect to material injury. If the determination is negative, the investigation is terminated. If the determination is positive, the ITA goes on to make its preliminary determination as to subsidization. The ITA preliminary determination is issued within 85 days after the filing of the petition.

The ITA must issue its final determination on subsidization within 75 days of the preliminary decision, whether this is affirmative or negative. If the ITA's final ruling is positive, the ITC will issue its

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(6) 19 U.S.C.A. section 1671b(a) and 1671b(b).

final determination on material injury either within 45 days of the ITA final decision where the preliminary ITA decision was affirmative or within 75 days where the ITA's preliminary determination was negative. A final negative ruling by the ITA terminates all proceedings.

A negative final determination by the ITC terminates the countervailing duty action. If the determination is affirmative, a countervailing duty order will be issued by the Department of Commerce.

ITC determinations are made on the basis of a majority vote. If a vote is tied, the Commission is deemed to have made an affirmative decision.

A properly documented countervailing duty petition can be disposed of within 205 days. Figure 1 shows the time frame for an uncomplicated petition. It should be noted, however, that U.S. law provides for extensions of certain time periods for complex cases and for cases involving upstream subsidy questions.

Either the ITA or the ITC can terminate an investigation at any time if the petition is withdrawn by the party commencing the action. An action can also be terminated where the Secretary of Commerce accepts an agreement with a foreign government to limit the volume of imports being investigated. Before accepting this type of quantitative restriction agreement, the Secretary must first determine, through consultation with potentially affected U.S. producers, workers and consuming industries, that termination is in the public interest.(7)

Under certain conditions, the Secretary of Commerce may suspend an investigation. This may happen where foreign government or exporters that account for substantially all of the imported products agree to cease exports, or to offset or eliminate the subsidy completely within six months.(8) Finally, for complex cases a suspension can occur in

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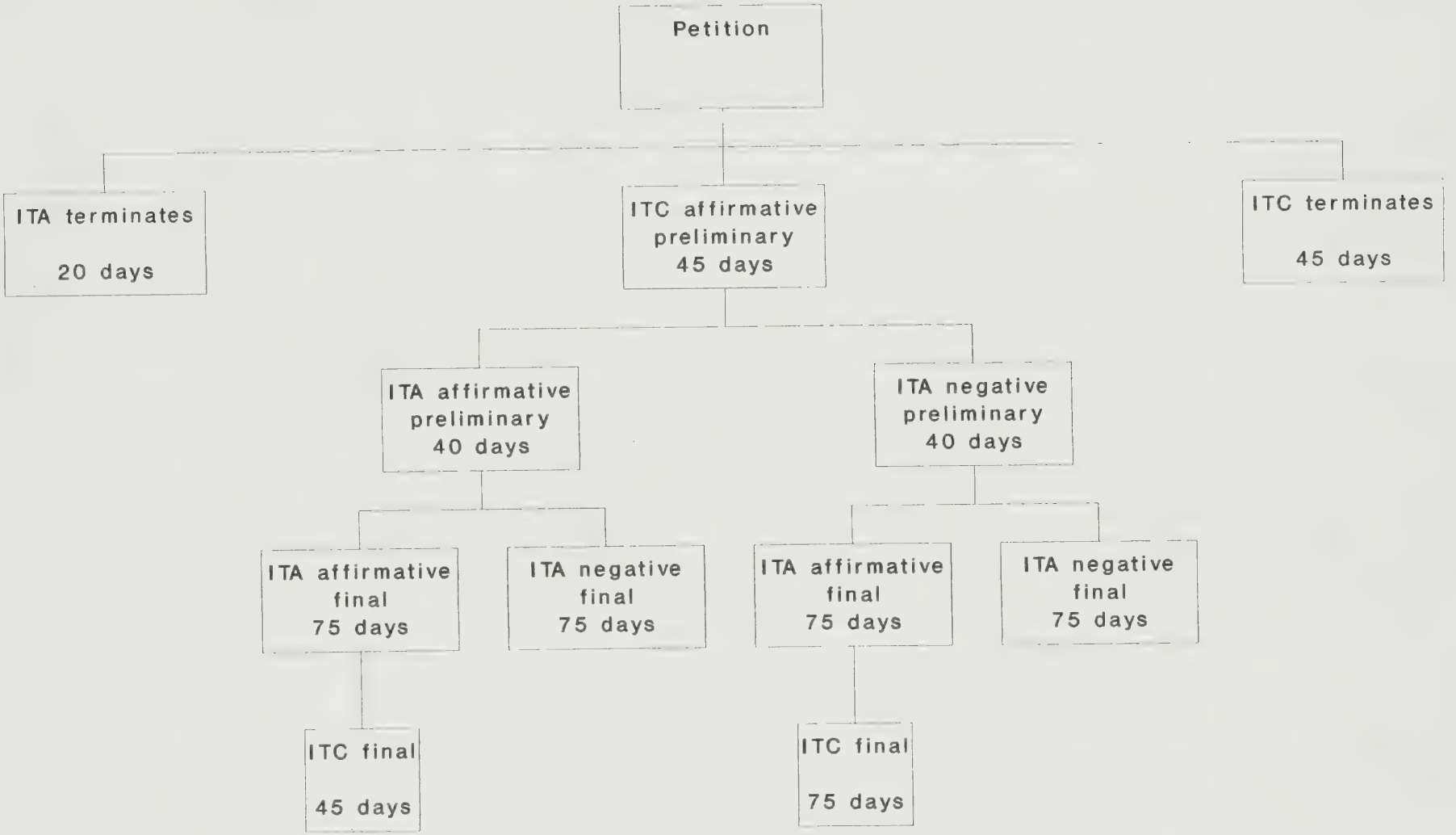
(7) Ibid., section 1671c(a)(2).

(8) Ibid., section 1671c(b).

Figure 1: Timetable for an Uncomplicated Countervailing Duty Investigation



Source: 19 U.S.C.A. S. 1671a - 1671e.

certain extraordinary circumstances (where suspension of the investigation is more beneficial to the domestic industry than continuation) by agreement with a foreign government or the principal exporters to eliminate the injurious effects of the exports.(9)

C. The Definition of Subsidy

As mentioned earlier, a countervailing duty investigation must examine two questions -- whether there has been subsidization of imports and whether this has resulted in material injury to domestic industry.

According to Title 19 of the United States Code, the term "subsidy" has the same meaning as the term "bounty or grant" in section 1303 and comprises any export subsidy described in the list of such subsidies in the GATT Subsidies Code (Appendix 1 gives a list of these subsidies). It also includes:

> The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:
> (I) The provision of capital, loans or loan guarantees on terms inconsistent with commercial considerations.
> (II) The provision of goods or services at preferential rates.
> (III) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.
> (IV) The assumption of any costs or expenses of manufacture, production, or distribution.(10)

U.S. countervailing duty law is designed to attack imports where domestic subsidies have been provided to specific companies or industries. From this it can be inferred that countervailing duties will be

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(9) Ibid., section 1671c(c).

(10) Ibid., section 1677(5)(A).

imposed where a benefit accrues to a specific industry but not where it is generally available to all industries in the economy. This is known as the principle of "general availability." This principle has been brought into U.S. countervailing duty law through the concept of specificity, which requires that a subsidy must be provided to a "specific" industry or enterprise in order for it to be countervailable.

Over the past few years there has been considerable controversy surrounding the ITA's interpretation of the specificity test. In several cases, the ITA interpreted the law to mean that a subsidy is countervailable only if it is available to a particular industry or group of industries. In a 1983 decision in relation to Canadian softwood lumber products, the ITA held that Canadian stumpage programs were available within Canada on similar terms regardless of the industry or enterprise of the recipient(11) and that any limitations on the kinds of industries using these programs resulted from the inherent characteristics of the natural resource not government action.(12) Thus, in the opinion of the ITA, these programs were generally available.

The ITA's interpretation of the specificity test was scrutinized by the U.S. Court of International Trade (CIT) in the 1985 decision, Cabot Corporation v. United States.(13) The Court held that "the generally available benefits rule as developed and applied by the ITA is not an acceptable legal standard for determining the countervailability of benefits."(14) According to the CIT, the appropriate standard requires the ITA to focus on the de facto effect of the benefits provided under a

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(11) Final Negative Countervailing Duty Determinations: Certain Softwood Products from Canada, 48 Federal Register, 31 May 1983, 24159, 24167.

(12) Ibid.

(13) 620 F. Supp. 722 (CIT 1985).

(14) Ibid., p. 732.

particular program rather than on their nominal general availability.(15) Thus, the ITA must determine whether a benefit or competitive advantage has been actually conferred on a specific industry or group of enterprises or industries.(16)

The Cabot interpretation of the specificity test was applied by the ITA in the second Canadian softwood lumber case in 1986.(17) Contrary to its 1983 decision, the ITA found that Canadian stumpage programs were being provided to a specific group of industries notwithstanding that they were nominally generally available and were actually used by more than one industry.

Since the second Softwood Lumber decision, the tenets of the Cabot interpretation of specificity were codified in U.S. law by the Omnibus Trade and Competitiveness Act of 1988. Now the ITA is required to determine whether a domestic subsidy is in fact given to a specific industry even though under the relevant law or regulation it is nominally available to industries in general.(18) Thus, in U.S. law, the de facto application of a subsidy has become the critical factor.

In applying the de facto specificity test to determine whether a program is limited to a specific enterprise or industry or group of enterprises or industries the ITA usually considers three factors. These are: the extent to which a foreign government acts (as demonstrated in the language of the relevant enacting legislation and implementing regulations) to limit the availability of a program; the number of enterprises, industries, or groups thereof that actually use a program, which may include the examination of disproportionate or dominant users; and the

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(15) Ibid.

(16) Ibid.

(17) Preliminary Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 51 Federal Register, 22 October 1986, 37453.

(18) 19 U.S.C.A. section 1677(5)(B).

extent, and manner in which, the government exercises discretion in making the program available.(19)

With respect to the last factor, the ITA reviews the government procedures for approving or rejecting applications for benefits. Accordingly, it examines relevant documents to ensure that a program which is statutorily available to all companies is not being administered in a manner that produces trade distortions.(20)

U.S. countervailing duty law also outlines the conditions for countervailing upstream subsidies. These are domestic subsidies given by a foreign government to "input products" used in the manufacture or production of the goods under investigation, where these subsidies significantly lower the cost of production and thus bestow a competitive benefit on the goods.(21) The law directs the ITA to find that a competitive benefit has been bestowed when the producer pays a lower price for the input product than he would have paid for that product in an arms-length transaction.(22) The amount of the benefit to be countervailed is the amount of the competitive benefit or the amount of the subsidy to the input product, whichever is less.

The amount of any countervailing duty imposed under U.S. law must equal the amount of the net subsidy that the ITA has determined has been bestowed on a product. In determining this, the ITA may subtract from the gross subsidy the amount of:

> (A) any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the subsidy,
> (B) any loss in the value of the subsidy resulting from its deferred receipt, if the deferral is mandated by Government order, and

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(19) Final Affirmative Countervailing Duty Determination: Fresh, Chilled and Frozen Pork from Canada, 54 Federal Register, 24 July 1989, 30774.

(20) Ibid., 30786.

(21) 19 U.S.C.A. section 1677-1(a).

(22) Ibid., section 1677-1(b).

> (C) export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the subsidy received.(23)

If the calculation of a subsidy results in a de minimus amount (currently less than one-half of 1% of the sale value of the product), no countervailing duty will be levied.(24)

U.S. COUNTERVAILING DUTY DECISIONS AGAINST CANADA

The United States uses countervailing duty measures more than any other nation, having launched some 308 cases from 1980-1987.(25) Since 1980 there have been a considerable number of American countervailing duty investigations of Canadian products (see Figure 2). These investigations have examined a vast array of government initiatives, including agricultural stabilization and regional development programs, tax incentives and government equity infusions into commercial enterprises. This portion of the paper will examine six of the cases in which the ITA found that subsidization had occurred in which the ITC determined that there had been material injury to U.S. producers. Discussion will be limited to the question of subsidization as determined by the ITA.

A. The Live Swine and Pork Case

In 1985, the ITA found that certain benefits provided to Canadian producers and exporters of live swine by 22 federal and provincial

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(23) Ibid., section 1677(6).

(24) 19 CFR, Part 355, section 355.8.

(25) Alan M. Rugman and Andrew Anderson, "How to Make the Free Trade Agreement Work," Trade Monitor, No. 11, July 1989, p. 1.

Figure 2

U.S. Countervailing Duty Investigations of Canadian Products, 1980-1989

Year Initiated	Case	Preliminary Determination		Final Determination	
		ITC	ITA	ITC	ITA
1980	Unprepared fish	Negative	-	-	-
1981	Herring fillet	Negative	-	-	-
1982	Rail passenger cars	Affirmative	Affirmative	Terminated (petitioner withdrew)	Terminated
1982	Certain softwood products (three cases) - Softwood lumber - Softwood shakes & shingles - Softwood fences	Affirmative	Negative	-	-
1984	Live swine and pork	Affirmative (swine only)	Affirmative	Affirmative (swine only)	Affirmative
1985	Red raspberries	Affirmative	Affirmative	Suspension	Terminated (government agreement)
1985	Oil country tubular goods	Affirmative	Affirmative	Affirmative	Affirmative
1985	Fresh Atlantic groundfish	Affirmative	Affirmative	Affirmative (only whole fish, no fillets)	Affirmative
1986	Softwood lumber	Affirmative	Affirmative	Terminated	Terminated (petitioner withdrew)
1986	Cut flowers (carnations)	Affirmative	Affirmative	Partial Affirmative	Affirmative
1988	New steel rails	Affirmative	Affirmative	Affirmative	Affirmative
1989	Fresh, chilled and frozen pork	Affirmative	Affirmative	Affirmative	Affirmative

Source: Jean-François Bence and Murray G. Smith, "Subsidies and the Trade Laws: The Canada-U.S. Dimension," International Economic Issues, April-May 1989, p. 15; U.S. Federal Register, various issues.

programs constituted subsidies; a countervailing duty was levied on these products.(26)

For the most part, the investigation focused on the various price stabilization programs offered to hog producers.These programs were found to be countervailable because they benefited a specific industry. The rationale applied by the ITA in finding that federal payments for a hog stabilization program under the Agricultural Stabilization Act (ASA) were countervailable is representative of the reasoning applied to a number of comparable provincial programs.

The federal ASA stabilization payments were held to be countervailable because: (i) they were made to selected agricultural products in specific amounts, e.g. hogs; (ii) the specific rates of support varied from commodity to commodity; and (iii) there was government discretion in the administration of the various stabilization schemes.(27)

Other provincial programs such as interest payment assistance, loan guarantees, and grants to defray the cost of transporting hogs to processing facilities were determined to be countervailable because they benefited a specific industry.

The Swine case reveals that the ITA defines subsidies in a number of ways. They could be government programs available to the agricultural sector as a whole or those given on a regional basis or those available to one sector of the industry. Programs available to more than one specific enterprise or group of enterprises were held to be countervailable if they "entailed differential treatment across commodity groups, and within a commodity group across individual producers, in terms of

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(26) Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork Products from Canada, 50 Federal Register, 17 June 1985, 25097. It should be noted that the ITC found that only subsidized imports of live swine from Canada were causing material injury to the U.S. hog industry. As a result of this determination, a countervailing duty was levied on live swine but not on pork.

(27) Ibid., 25101.

eligibility for and level of subsidy payments".(28) As noted above, payments under the federal ASA and provincial stabilization programs were countervailable because there were variations in the level of support from commodity to commodity and/or discretion in determining eligibility for and the amount of support payments.

Thus, it would appear that government discretion in the application of a program and the program's naming of commodities were significant factors in the subsidization determination.

B. The Fresh Atlantic Groundfish Case

In this 1986 decision, the ITA found that some 11 federal, 6 joint federal-provincial and 38 provincial programs conferred subsidies on the producers or exporters of certain fresh Atlantic groundfish from Canada.(29) Federal grants to construct, modify or re-equip fishing vessels were countervailable because they were determined to be applicable to a specific industry. Other programs were countervailable because they benefited companies located in a specific region within a province.

Of particular importance in this case were the equity infusions made by the government into two fish processing companies - National Sea Products Limited and Fishery Products International Limited. In its decision, the ITA noted that government provision of equity does not per se confer a countervailable benefit; this is the case only when these infusions occur on terms that are inconsistent with commercial considerations.(30) The ITA went on to find that at the time of the government investment, the financial condition of these companies had been such that a reasonable investor acting according to normal commercial considerations

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(28) Grace Skogstad, "The Application of Canadian and U.S. Trade Remedy Laws: Irreconcilable Expectations?" Canadian Public Administration, Vol. 31, No. 4, Winter 1988, p. 539-565 at p. 549.

(29) Final Affirmative Countervailing Duty Determination: Certain Fresh Atlantic Groundfish from Canada, 51 Federal Register, 24 March 1986, 10041.

(30) Ibid., 10047.

would not have invested in them. Accordingly, the government equity infusions constituted a countervailable benefit.

The ITA's treatment of government provided infrastructure programs warrants discussion since there has been considerable concern about whether basic items such as public highways and public education are countervailable subsidies. In the Atlantic Groundfish case one of the federal programs under scrutiny was the Small Craft Harbours program, pursuant to which the Department of Fisheries operates and maintains over 2,000 small craft harbours. Berthage fees are charged to users, but at a reduced rate for commercial fishermen.

In examining this program, the ITA set out the factors that it considers when determining whether an infrastructure program provides a countervailable subsidy. These are whether the government limits who can move into the area where the infrastructure has been built; whether the infrastructure is used by more than a specific enterprise or industry or group ...; and whether industries have equal access to or receive benefits from the infrastructure on the basis of neutral criteria.(31) Where limitations on use do not result from government activities, but rather from the inherent characteristics of the specific infrastructure item, the ITA is not likely to find a countervailable benefit.

To the extent that the federal government charged preferential rates to commercial fishermen for harbour facilities, the ITA found that the Small Craft Harbours Program conferred a countervailable subsidy. Had no preferential rates been given, this infrastructure program would not have been dutiable.

It is interesting to note that one of the programs found not to be countervailable in the Atlantic Groundfish case was the unemployment insurance benefit program for self-employed fishermen. In order to decide otherwise, the ITA would have had to find that the insurance had been provided on preferential terms to a specific enterprise or industry. The ITA compared the terms of unemployment insurance provided for self-employed

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(31) Ibid., 10065.

fishermen with those provided under the unemployment insurance program generally, and found that there were no preferential terms extended to fishermen.(32)

C. The Oil Country Tubular Goods Case

In April 1986, the ITA assessed a countervailing duty against certain "oil country tubular goods from Canada" - hollow steel products intended for use in drilling oil or gas.(33) In this case, certain types of investment tax credits and regional development programs were found to confer subsidies.

In examining the various categories of investment tax credits, the ITA noted that because two of these programs were directed at encouraging investment in certain regions of Canada, they were therefore countervailable. Similarly, federal development incentives to manufacturers for establishing or modernizing facilities in economically disadvantaged areas of the country were considered to be subsidies.(34)

D. The Fresh Cut Flowers Case

In this decision, the ITA found that the Ontario Greenhouse Energy Efficiency Program (GEEP) conferred a subsidy on producers of cut carnations in Canada.(35)

Under this program grants were given to greenhouse growers to retrofit existing greenhouses in Ontario to make them more energy efficient. In determining that the program was specific and therefore countervailable, the ITA noted that it was not available to the entire agricultural sector in Ontario, only to those specific industries using

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(32) Ibid., 10059.

(33) Final Affirmative Countervailing Duty Determination: Oil Country Tubular Goods from Canada, 51 Federal Register, 22 April 1986, 15037.

(34) Ibid., 15039.

(35) Final Affirmative Countervailing Duty Determination: Certain Fresh Cut Flowers from Canada, 52 Federal Register, 20 January 1987, 2134.

greenhouse technology.(36) On the other hand, programs which provided loans to farmers for a wide range of farm improvements were not countervailable because they were available to the agricultural sector as a whole.(37)

E. The New Steel Rails Case

In July 1989, the ITA issued a final affirmative countervailing duty determination in respect of the importation of new steel rails from Canada.(38) This decision looked at subsidies to two Canadian producers - Algoma Steel Corporation and Sydney Steel Corporation (Sysco). Only subsidies provided to Sysco were found to be countervailable, those to Algoma being below the de minimus amount.

Among the programs examined by the ITA in this case were regional development incentive programs, certain investment tax credits, economic and regional development agreements and certain grants, debenture guarantees and equity infusions into Sysco.

In examining the debenture guarantees, loan guarantees and equity infusions by government into Sysco, the ITA looked at whether the company was "creditworthy" and "equityworthy." The ITA considers a company not to be equityworthy if it is "unable to generate a reasonable rate of return within a reasonable period of time."(39) Furthermore, a company is not creditworthy if it will not have sufficient resources or revenues to meet its costs and fixed financial obligations in the absence of government

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(36) Ibid., 2137.

(37) Ibid., 2135.

(38) Final Affirmative Countervailing Duty Determination: New Steel Rail, Except Light Rail from Canada, 54 Federal Register, 3 August 1989, 31991.

(39) Ibid., 31992.

intervention.(40) After analyzing Sysco's financial position from 1973 to 1988, the ITA found the company to be neither creditworthy nor equity-worthy. As a result, the various loan and debenture guarantees and equity infusions into Sysco were deemed to be countervailable.

The ITA also looked at the economic and regional development agreements signed by the federal government and the Nova Scotia government, and at the subsequent subsidiary agreements signed to create programs, outline administrative procedures and establish federal-provincial funding responsibilities. The ITA noted that two such agreements had implications for Sysco. The first provided for the modernization of the Sysco plant. The second dealt with funding for economic planning studies throughout Nova Scotia.

The ITA found the money provided under the first agreement to be countervailable, since it provided grants to a specific enterprise. Only funds provided by the federal government were held to be countervailable under the second agreement, however, because they were limited to companies in a particular region of Canada (i.e., Nova Scotia). Provincial contributions under this agreement were not countervailable because the assistance was not limited to a specific enterprise or industry or group within the province.(41)

Certain investment tax credit programs were also found to be countervailable. As it has in other cases, the ITA determined that additional credits available to industry to locate in certain disadvantaged regions of Canada constituted subsidies.

F. The Fresh, Chilled and Frozen Pork Case

In July 1989, the ITA issued a final affirmative countervailing duty determination against fresh, chilled and frozen pork products

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(40) Ibid.

(41) Ibid., 31996.

from Canada.(42) In this case, the ITA applied one of the trade law amendments enacted under the Omnibus Trade and Competitiveness Act of 1988.

Under this new provision, which was enacted in direct response to a successful appeal by the Canadian Meat Council of the 1985 ITA decision in the Swine case, subsidies to the producers of raw agricultural products will be deemed to be provided to the processed agricultural products derived therefrom where the demand for the raw product is "substantially dependent" on the demand for the processed product and the "processing operation adds only limited value to the raw commodity."(43) By relying on this provision, the ITA was able to find that subsidies to live swine were also provided to Canadian pork producers.

As in the 1985 Swine case, the ITA found the price stabilization scheme for hogs established under the federal Agricultural Stabilization Act to be countervailable. The most important factor in the 1989 decision was the extent and the manner in which the government exercised its discretion in making the program available. The ITA noted that: there were no "explicit or standard criteria" for evaluating requests to include a commodity in the program; the level of price stabilization and the terms varied at the discretion of the government from commodity to commodity; and support levels varied for the same product as well as from product to product.(44)

TRENDS IN ITA DECISION-MAKING

From the U.S. countervailing duty cases to date, it is possible to discern likely attitudes to Canadian programs.

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(42) Final Affirmative Countervailing Duty Determination: Fresh, Chilled and Frozen Pork from Canada, 54 Federal Register, 24 July 1989, 30774.

(43) 19 U.S.C.A. section 1677-2.

(44) Ibid., 30777.

First, the ITA tends to regard regional development programs as countervailable subsidies. In fact, one study notes that in every case involving non-agricultural Canadian exports since the U.S. implemented the GATT Subsidies Code "any federal government program or tax expenditure targeted to specific regions of Canada, or provincial measures targeted to specific regions of a province, have been determined to be countervailable subsidies."(45)

Second, government equity infusions, loan guarantees, or other forms of financial assistance to commercial enterprises are more than likely to constitute countervailable subsidies. In the Sysco case, grants by the province of Nova Scotia to cover principal payments of long-term debentures of Sydney Steel Corporation, provincial grants to cover operating expenses and certain capital expenditures, long-term loan guarantees, and equity infusions amounted to a net subsidy of 76.79% ad valorem.

In the Atlantic Groundfish case a significant portion of the subsidy calculated by the ITA (approximately one-third) came from equity infusions into two fish processing companies. Although the ITA found that these infusions were inconsistent with normal commercial considerations, the commercial success of these companies calls this decision into question. It is at least arguable that some portion of the government equity infusions in this case should not have been countervailable.(46)

Third, programs whose availability is at the government's discretion are likely to be countervailable. In the 1986 Softwood Lumber decision, the ITA noted that provincial authorities had a wide degree of discretion in determining who would receive stumpage rights and that the criteria employed in making these determinations were not defined objectively in either the implementing legislation or the relevant

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(45) Jean-François Bence and Murray G. Smith, "Subsidies and the Trade Laws: The Canada-U.S. Dimension," International Economic Issues, April-May 1989, p. 13.

(46) Ibid., p. 14.

regulations.(47) Thus, in this case, the provision of stumpage was held to be a countervailable subsidy because the manner in which the discretion was exercised resulted in the provision of the benefit to a specific group of enterprises. Similarly, in the Swine and Pork cases, the element of discretion involved in the granting of stabilization payments under the federal Agricultural Stabilization Act was crucial to a finding of subsidization.

Fourth, programs that are clearly directed to benefit specific industries are likely to be countervailable. Grants to commercial fishermen for retrofitting fishing vessels, and to businesses for re-equipping greenhouses with energy-saving materials are examples of these.

Finally, it should be noted that despite a finding of subsidization by the ITA, if the amount of the subsidy is below the de minimus level (0.5%) no countervailing duty will be levied. For the most part, Canadian regional development subsidies have tended to fall below the de minimus level, although when taken in conjunction with other types of subsidies such as stumpage rights or equity infusions, they have contributed to an overall finding of subsidization.

Looking at ITA findings of subsidization from a wider perspective, one author has concluded that they tend to reflect government practice in the United States. In other words, the ITA is influenced "by its own view of which functions are appropriately performed by governments."(48) He concludes that subsidy practices can be categorized as follows: (i) those that are cleared from a finding of subsidization; (ii) those that are found to be subsidies with very little analysis on the part of the ITA (virtually automatic subsidies); and (iii) those where a

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(47) Preliminary Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 51 Federal Register, 22 October 1986, 37456.

(48) Daniel K. Tarullo, "Beyond Normalcy in the Regulation of International Trade," Vol. 100, No. 3, Harvard Law Review, January 1987, p. 546-628 at p. 569.

finding of subsidization depends on the circumstances of the particular case.(49)

Practices falling in the first category include the provision of information services to exporters and broad-based aid to agriculture. The second category might comprise equity infusions into commercial enterprises, loan guarantees and incentives for companies to locate in a particular region. Programs that might produce either an affirmative or a negative subsidy finding include job retraining programs and research and development assistance to industry.(50)

For the most part, ITA decisions respecting Canadian programs reflect this categorization and confirm these conclusions.

SUBSIDIES AND THE FREE TRADE NEGOTIATIONS

Under the Canada-U.S. Free Trade Agreement there is a five to seven year period during which the two countries will attempt to reach agreement on a new subsidies regime in relation to bilateral trade. This regime should more accurately balance the competing principles recognized by the GATT Subsidies Code for two countries with differing traditional interpretations of the role of government in the economy and whose exports represent substantially different proportions of total domestic production.

Negotiations concerning subsidies and countervailing duties are also underway as part of the Uruguay Round of the GATT multilateral trade talks expected to conclude at the end of 1990. In all probability, the FTA discussions will build upon the foundation established in the GATT.

Several options are open to improve the subsidies regimes of both countries. Some of these might include:

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(49) Ibid., p. 567.

(50) Ibid., p. 567-568.

(a) raising the de minimus level above 0.5%;
(b) establishing a more stringent definition of material injury;
(c) creating a minimum percentage import threshold for goods from either country before a countervailing duty action could be started;
(d) requiring that material injury be directly attributable to subsidization or that subsidization be a significant cause of injury;
(e) applying duties only to the differential between subsidies received by industry in the exporting country and those received by the industry bringing the complaint;
(f) negotiating a list of permissible and/or countervailable subsidies;
(g) ensuring that cost offsets (i.e., the cost incurred by industry to locate in a disadvantaged region) are included in the calculation of regional subsidies in order to reflect more accurately the value of the subsidy;
(h) establishing precise and consistent methods for calculating subsidies;
(i) creating a joint tribunal to administer a new subsidies regime;
(j) reducing the potential for the commencement of frivolous actions by requiring complainants to post security when commencing an action or by adopting measures to ensure that the complainants actually represent the greater part of the affected domestic industry.(51)

Indeed, a number of the foregoing options have already been been suggested by Canada in its recently tabled proposals for reform of the GATT Subsidies Code. If these proposals are adopted by Canada's trading partners, the task of the bilateral negotiators should be less daunting.

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(51) See Michael Hart, "The Future on the Table," paper presented to a University of Ottawa Conference on Free Trade, 5 May 1989, and Murray G. Smith with C. Michael Aho and Gary N. Horlick, Bridging the Gap: Trade Laws in the Canadian-U.S. Negotiations (Canadian-American Committee, 1987).

APPENDIX 1

ANNEX

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

(*a*) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.

(*b*) Currency retention schemes or any similar practices which involve a bonus on exports.

(*c*) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(*d*) The delivery by governments or their agencies of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for delivery of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.

(*e*) The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes [1] or social welfare charges paid or payable by industrial or commercial enterprises. [2]

(*f*) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect of production for domestic consumption, in the calculation of the base on which direct taxes are charged.

(*g*) The exemption or remission in respect of the production and distribution of exported products, of indirect taxes [1] in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(*h*) The exemption, remission or deferral of prior stage cumulative indirect taxes [1] on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior stage cumulative indirect taxes are levied on goods that are physically incorporated (making normal allowance for waste) in the exported product. [3]

(*i*) The remission or drawback of import charges [1] in excess of those levied on imported goods that are physically incorporated (making normal allowance for waste) in the exported product; provided, however, that in particular cases a firm may use a quantity of home market goods equal to, and having the same quality and characteristics as, the imported goods as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, normally not to exceed two years.

(*j*) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the costs of exported products [4] or of exchange risk programmes, at premium rates, which are manifestly inadequate to cover the long-term operating costs and losses of the programmes. [5]

(*k*) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a signatory is a party to an international undertaking on official export credits to which at least twelve original signatories [6] to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original signatories), or if in practice a signatory applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

(*l*) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of the General Agreement.

NOTES

[1] For the purpose of this Agreement:

The term " direct taxes " shall mean taxes on wages, profits, interest, rents, royalties, and all other forms of income, and taxes on the ownership of real property;

The term " import charges " shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;

The term " indirect taxes " shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;

" Prior stage " indirect taxes are those levied on goods or services used directly or indirectly in making the product;

" Cumulative " indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production;

" Remission " of taxes includes the refund or rebate of taxes.